

Janet Napolitano
Governor

Colleen Connor
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Marcia J. Busching
Chair

Kathleen S. Detrick
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Tracey A. Bardorf
Gary Scaramazzo
Commissioners

State of Arizona
Citizens Clean Elections Commission

1616 W. Adams - Suite 110 - Phoenix, Arizona 85007 - Tel (602) 364-3477 - Fax (602) 364-3487 - www.azcleelections.gov

PROBABLE CAUSE RECOMMENDATION

To: Commissioners

From: L. Gene Lemon, External Investigative Consultant

Date: June 9, 2005

Subject: MUR # 04-0029 – Rick Murphy

This shall reaffirm that I intend to proceed with my May 10, 2005 probable cause recommendation pursuant to A.A.C. R2-20-214(D).

Representative Rick Murphy responded to my May 10, 2005 brief by letter dated May 17, 2005 (copy attached). I find no merit in the responses and hereby give notice that I will proceed with my recommendation that the Commission find probable cause to believe that violations of the Citizens Clean Elections Act and Commission rules has occurred.

The Commissioners are advised that the Commission staff has written compliance requests to the candidates identified in the Murphy response as having failed to comply with the Act in the same manner as Representative Murphy failed to comply, unless a complaint against the candidate is already pending or reporting appears satisfactory. If voluntary compliance is not forthcoming, staff will consider an internally originated complaint in each case.

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May 10, 2005

Mr. Rick Murphy
P. O. Box 6793
Glendale, AZ 85312

RE: CCEC File MUR No. 04-0029 - **REVISED**

Dear Mr. Murphy:

I am writing in reference to the Commission's investigation and reason to believe finding that you have violated A.R.S. Sec. 16-948(C) and A.R.S. Sec. 16-941(C)(2). Pursuant to A.A.C.R2-20-214, this letter shall serve as the brief setting forth my position on the factual and legal issues in the case and contains my recommendations that the Commission should find probable cause to believe that there has been a violation of each of the sections of the Clean Elections Act referenced. As the civil penalty for the violations I will recommend that the Commission fix the amount at \$ 10,000.00 pursuant to A.R.S. Sec. 16-942(B).

I have reviewed the supplemented Complaint, your responses, the Commission's Reason to Believe Finding and your Reply, the Report of Miller, Allen & Co. on its examination of your campaign account and records, and such other sources of information as I have deemed appropriate in formulating my recommendations. My findings are as follows:

I. Procedural Matter

In your Reply you note that the Commission's notarization requirements were not technically complied with and therefore the Complaints should be dismissed regardless of merit. It is true that neither the Complaint nor its supplement bear a formal *jurat*; they just carry a notarial stamp and signature although due to a change in Commission office procedures the supplement's signature page was copied with a notarial certificate which was completed at the time the supplement was filed. The Commission's practice has been to construe liberally the requirements of A.A.C. R2-20-203 and process a complaint if there is substantial compliance with the requirements of the rule. I find that the Commission should not dismiss the Complaint because substantial compliance with the rule was achieved.

II. Early Ballot Requests, etc.

The Complaint made a number of accusations that your campaign violated Arizona laws governing early ballot requests and hindrances to voting. I have found no evidence that you conspired with Constantin Querard as alleged in the Complaint or that an early ballot campaign was conducted in District 9 on your behalf. I find that there is no merit to any of those allegations.

III. Payment Directly to Person Providing Goods and Services

Participating candidates, or persons authorized by them, are required to pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of Arizona's campaign contributions and expenditures law, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made. A.R.S. Sec. 16-948(C).

The Report of Miller, Allen & Co. states that the auditors selected seven campaign disbursements to test that the name, address, and nature of goods or services provided agree to the information reported in the candidate's campaign finance report. They completed their testing procedures without any finding of exception. (Indeed, all of the testing procedures agreed to between the auditors and the Commission were completed and no exceptions were found to indicate that your campaign committee failed to meet the requirements for which compliance was tested.)

My investigation, however, has resulted in the finding that your campaign wrote nine checks to Constantin Querard totaling \$20,556.37, six being identified as being for "mailing", two for "automated calls" and one for "signs". In total, your campaign's expenditures amounted to \$30,284.73. Thus for two-thirds of your total expenditures, the name and address of the person actually providing goods or services to your campaign, and the compensation that person received is not disclosed, only the middleman is.

In your responses and reply, you assert that Mr. Querard was the vendor, that virtually all candidates reported as you did, and that to require you to comply with the Act's requirements would violate your constitutional rights. I do not find any of these arguments persuasive. This is not the first time this issue has come before the Commission. In CCEC MUR #04-0025, In the Matter of Mark Manoil and Nina Trasoff, the Commission found reason to believe that the participating candidates' reports of payments to their campaigns consultants for "literature," without identifying on the campaign finance report the person who provided the goods or services, postage used for the mailer, printer for printing, and graphic designer who created the mailer, violated the Act and issued an Order Requiring Compliance. Within the specified time for compliance, the candidates/respondents amended their campaign finance reports to disclose the required information. Thereafter, the Commission acknowledged their compliance and dismissed the matter.

The Commission also made a reason to believe finding in CCEC MUR #04-0028/37, In the Matter of Pamela Gorman, based upon similar allegations. In the Gorman matter, the Commission found reason to believe that the candidate had violated A.R.S. § 16-948(C) because she had failed to pay the vendor directly for goods and services. After issuing an Order

Requiring Compliance, the candidate amended her campaign finance reports to disclose the required information. In this case as well, the Commission acknowledged Gorman's compliance and dismissed the matter.

In CCEC MUR #04-0048, In the Matter of Royce Flora, the complaint alleged violations of A.R.S. § 16-948(C). The Commission accepted the staff's recommendation of no reason to believe findings in part because, once the candidate received the complaint, the candidate amended their campaign finance reports to disclose the required information.

One of the purposes of the Act was to "diminish [] the influence of special-interest money..." A.R.S. Sec. 16-940, and the Act specifically prohibits the acceptance of private contributions by participating candidates. Lumping expenditures by merely reporting the transfer of funds from the campaign account to a campaign consultant hides the material facts the law requires to be disclosed and possibly, illegal contributions. In other words, the consultant's billing statement or invoice to the candidate may show that a particular good or service cost a certain amount; however, without the reporting of the underlying costs (i.e. for printing, mailing, etc.), it is impossible for the Commission to determine whether the candidate has accepted any illegal in-kind contributions. For example, if the underlying invoices (for printing, mailing, etc.) show that it actually cost more to create a certain piece of campaign literature than what was actually charged to the candidate by a consultant or "message vendor", then somebody or something is "subsidizing" that particular campaign by making in-kind contributions. Without the reporting requirements imposed by the Commission's rules, it would be difficult, if not impossible, to discover those situations in which the contribution limits have been violated.

Based upon the facts detailed above, I recommend that the Commission find probable cause to believe that a violation of the Act and/or Commission rules has occurred; namely that the Respondent violated A.R.S. § 16-948(C).

IV. Reporting Requirements

While the Complaint alleged that you violated Commission reporting requirements, I find that such is not the case. From your reply and the evidence, you received your primary election period funding from the Commission late on August 13, 2004, and made your first campaign mailing on August 19, 2004. The Pre-Primary Report due August 26, 2004, covers the period from June 1 through August 18, 2004. Expenditures made on and after August 19, 2004, are required to be reported in the Post-Primary Report due October 7, 2004. Your expenditures appear to have been reported timely. Therefore, I recommend that the Commission find no probable cause to believe that a violation of the Act as alleged occurred.

V. Civil Penalty

I recommend that the Commission make a finding that there is probable cause to believe that Respondent violated A.R.S. Sec. 16-948(C) and that no probable cause exists to support any other allegations of the Complaint, and issue an Order assessing a civil penalty in accordance with A.R.S. Sec. 16-942(B). Pursuant thereto, the civil penalty for a violation by or on behalf of any legislative candidate of any reporting requirement imposed by Chapter 6 of Title 16 shall be \$110.00 per day, resulting in a very large amount being now specified by the Act due to the passage of time. R2-20-222 of the Commission's rules generally limits penalties for violation of

the Act to \$10,000.00, and I find it appropriate to recommend use of that general rule in this matter. Accordingly, I will recommend a civil penalty of \$ 10,000.00 for which the candidate and the candidate's campaign shall be jointly and severally responsible.

VI. Briefing Procedures

Within five (5) days from receipt of this letter from the External Investigative Consultant, the Respondent may file a brief with the Commission setting forth the Respondent's position on the factual and legal issues of the case pursuant to A.C.C. R2-20-214(C). After reviewing the Respondent's brief, the External Investigative Consultant shall promptly advise the Commission in writing whether he intends to proceed with the recommendation or to withdraw the recommendation from Commission consideration.

Sincerely,

L. Gene Lemon
External Investigative Consultant
Citizens Clean Elections Commission

cc: Commissioners